

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

SCHREIBER AND ASSOCIATES P.C. and)	
S&A SERVICES OF WATERTOWN, Ltd.)	
99 Rosewood Drive)	
Danvers, Massachusetts 01923, and)	
)	
Petitioners,)	HEARING REQUESTED
)	
v.)	D.T.E. 02-86
)	
CTC COMMUNICATIONS)	
220 Bear Hill Road)	
Waltham, Massachusetts 02451)	
)	
Respondent.)	
)	

**RESPONSE OF SCHREIBER AND ASSOCIATES, P.C. AND S&A SERVICES OF
WATERTOWN LTD. TO BRIEFING QUESTIONS**

Petitioners Schreiber and Associates, P.C., (“Schreiber”) and S&A Services of Watertown, Ltd. (“S&A”) (collectively, “Schreiber”) are pleased to provide the following responses to the briefing questions issued by the Department of February 25, 2003. The questions are:

1. Given the Department’s historical practice to limit customer complaint adjudications to residential customers only (see, e.g., Teleprocessing, Inc., D.P.U. 91-34 (1992)), does the Department have jurisdiction over Schreiber’s Complaint? Is it discretionary?
2. If the Department does have jurisdiction, should we assume it in this instance?

Schreiber’s brief answers to the questions are:

1. The Department has jurisdiction over Schreiber’s complaint, which is easily distinguishable from the *Teleprocessing* case. The nature of Schreiber’s complaint is such that it will not require the Department to revise the general policy derived from *Teleprocessing*. The Department’s

jurisdiction in this matter is not discretionary, as that term is typically used in Massachusetts administrative law. The Department has broad discretion in conducting its investigation of the complaint and in fashioning a remedy, should the Department determine that one is required. The Department's discretion, however, is not so broad as to allow the Department to dismiss the complaint without further investigation on the grounds that its jurisdiction is purely discretionary.

2. Even if the Department's jurisdiction were purely discretionary, Schreiber's complaint would be an appropriate subject for the exercise of that discretion. The Department has already exercised discretionary jurisdiction over the practices of financially-troubled or bankrupt carriers, and the Department's jurisdiction pursuant to G.L. c. 159, § 16 is the appropriate vehicle for examining the operations of a distressed competitive local exchange carrier ("CLEC") where the circumstances so warrant, as they do in this case.

I. The Department Has Jurisdiction Over Schreiber's Complaint and It Must Exercise That Jurisdiction In Compliance With The Massachusetts Administrative Procedures Act and The United States and Massachusetts Constitutions.

General Laws c. 159 grants the Department plenary jurisdiction over nearly all aspects of a telephone company's operations. The Department has exercised its Chapter 159 jurisdiction to supervise telephone companies beginning of their existence to the end. *See, e.g., Fiberline Network Communications*, D.P.U. 90-28/90-46 (September 14, 1990) (regarding petition for a certificate of convenience and necessity to operate as a common carrier); *Mass Migrations*, D.T.E. 02-28 (August 7, 2002) (adoption procedures for mass migrations of telecommunications end users from distressed carriers).

In its complaint, Schreiber has invoked, among other things, the Department's jurisdiction under G.L. c. 159, §§ 12 and 16, which are particularly broad in their application.

Section 12 states, in pertinent part:

The department shall, so far as may be necessary for the purpose of carrying out the provisions of law relative thereto, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth . . .

. . .

(d) The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith.

Section 16 states, in pertinent part:

If the department is of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the department shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby. . . .

The Department has used its jurisdiction under Sections 12 and 16 to supervise the full range of activities undertaken by telecommunications carriers in Massachusetts. *See, e.g. Network Plus, Inc.*, D.T.E. 02-15 (February 20, 2002) (adequacy of service provided by carrier in Chapter 11 bankruptcy) *Broadview Networks, Inc.*, D.T.E. 02-14-A (February 22, 2002) (propriety of the handling of customers of the bankrupt carrier Net2000); *Verizon-Massachusetts*, D.T.E. 99-77 (March 2, 2001) (service quality and adequacy of infrastructure).

1. The Department Has Jurisdiction Over Schreiber's Complaint.

Schreiber's complaint clearly falls within the ambit of the Department's broad supervisory powers. As described in the Complaint, Schreiber and CTC executed a customer service agreement in which CTC agreed to provide Schreiber with, among other things, various telecommunications services pursuant to CTC's tariff filed with the Department, Tariff M.D.T.E. No. 3. CTC failed to provide those services as described in its tariff, and failed in such a manner as to call into question CTC's technical, managerial, and financial capability to provide the services so described. These failures caused Schreiber great hardship and expense, leading

Schreiber to terminate its agreement with CTC (for which CTC has sought to impose early termination liability).

Each of the various aspects of Schreiber's Complaint has been the subject of a proceeding by the Department pursuant to its statutory authority pursuant to Sections 12 and 16, from service quality issues (D.T.E. 99-77, *supra*) to the propriety of termination fees charged to business customers, in a complaint brought by CTC itself (*CTC Communications*, D.T.E. 98-18). Schreiber asks that the Department investigate these various service failures and determine whether CTC's practices comport with the requirements imposed by statute and regulation on Massachusetts common carriers and, if not, to fashion a remedy appropriate to the circumstances. The only specific remedy Schreiber seeks is a declaration that its agreement with CTC be declared null and void due to the extent of CTC's failure to provide service as described in its tariff and as agreed to in the customer service agreement. The Department's authority to investigate such allegations and grant appropriate relief is beyond question.

2. The Department's Practice With Respect to Mere Billing Disputes Does Not Deprive the Department of Jurisdiction Over Schreiber's Complaint, and That Jurisdiction Must Be Exercised In A Manner That Comports With the Requirements of the Massachusetts Administrative Procedures Act and the Massachusetts Constitution.

The Department's historical practice of limiting customer complaint adjudications regarding billing disputes to residential customers only is not implicated by Schreiber's complaint. In *Petition of Teleprocessing, Inc.*, D.P.U. 91-34 (August 4, 1992), the case cited in the Hearing Officer's memorandum, the name of one commercial customer, AVC, was transferred to the account of another commercial customer, TPI. As a result, AVC was billed for nearly five years of TPI's electric service (amounting to about \$120,000). When the mistake was discovered, AVC was given a refund and Boston Edison rendered a bill to TPI for the refunded amounts. There was no dispute that the TPI had, in fact, electric service from Boston Edison

during the five years in question. TPI filed a complaint against Boston Edison with the Department seeking relief from the past due amounts.

The Department declined to exercise jurisdiction over what Boston Edison described as a mere “refusal to pay for services rendered.” The Department found that it had exercised its statutory authority to enact regulations governing the billing and termination practices of electric utilities with respect to residential customers, but had not done so with respect to commercial customers. Thus, the Department’s regulations provided no relief for the type of billing dispute raised by TPI. The Department touched on the other bases raised by TPI only long enough to dispose of them. TPI attempted to cast its complaint as a matter of tariff interpretation, which would be in the Department’s primary jurisdiction. The Department found, however, that the only issue of tariff interpretation required was an interpretation of the terms “customer” and “succeeding occupant” as used in the section of Boston Edison’s tariff whereby a customer is obliged to pay for electric service rendered at a service location. The Department found that TPI was a “succeeding occupant” for purposes of that tariff page, thus rendering the matter purely one of contract between the parties, better suited to the courts than to the Department.

Schreiber’s Complaint presents very different issues. As alleged in the Complaint, CTC’s failures were not in the nature of a billing error, as in the *Teleprocessing* case, or a routine outage caused by events arguably beyond the company’s control. CTC’s failure to provide service as described in its tariff calls into question the company’s general business practices, not an anomalous event that is unlikely to recur. In the *Teleprocessing* case, the Department recognized that it has jurisdiction “where general business practices of a utility have been called into question.” *Teleprocessing, supra*, at 7. Further, CTC’s failures in this case raise serious concerns about the company’s technical, financial, and managerial ability to provide the services

described in its Massachusetts tariff. The Department clearly has jurisdiction over such issues, and has used that jurisdiction to supervise the practices of distressed telecommunications carriers. *See, e.g., Network Plus, Inc., supra*, at 2-3. The matters raised in Schreiber's complaint are, thus, markedly different than those at issue in the *Teleprocessing* case, or other simple billing matters, and the Department has jurisdiction to pursue those matters to ensure that CTC's "regulations, practices, equipment, appliances [and] service" comport with the requirements of Section 16.

There are also strong legal grounds for limiting the Department's holding in *Teleprocessing* to the narrow issue of billing disputes regarding payment for services rendered. First, that case turned primarily on the fact that the Department had acted upon its statutory grant of authority to enact billing and termination regulations for residential customers only, not commercial customers. There was some evidence that the Legislature intended such a result when it enacted G.L. c. 164, §§ 76, 78, and 94. The Department has taken a similar approach to the billing and termination practices of telecommunications companies. It adopted standards for the treatment of residential customers in D.P.U. 18448 (1977), and has applied those standards to CLECs, although not through a formal rulemaking.

There is no evidence, however, that the Legislature intended to limit the Department's Section 12 and Section 16 jurisdiction with respect to non-billing matters to residential customers only. As applied to non-billing matters that are otherwise clearly within the Department's jurisdiction, there is simply no basis for declining to hear the complaints of commercial customers. Moreover, the Department would have to cite definitive statutory grounds for making such a distinction with respect to non-billing matters in order to avoid

violating both the Massachusetts Administrative Procedures Act (“APA”) and the Massachusetts Constitution.

The APA requires that “[i]n conducting adjudicatory proceedings, as defined in this chapter, agencies shall afford all parties an opportunity for full and fair hearing.” G.L. c. 30A, § 10. The APA does not grant an agency the discretion to apply G.L. c. 30A, § 10 to some complainants and not to others. The Department’s “discretionary” jurisdiction can be found with respect to non-adjudicatory matters, such as rulemakings or investigations on the Department’s own motion. The Department’s regulations at issue in the *Teleprocessing* case were an example of the Department exercising its discretionary jurisdiction to promulgate billing and termination regulations regarding residential customers but not commercial customers.

In this case, however, distinguishing between residential and commercial customers for purposes of a complaint properly invoking the Department’s supervisory authority under G.L. c. 159, §§ 12 and 16 with respect to the practices and service of a telecommunications company would violate the APA. The APA defines a “party” to an adjudicatory proceeding to include “the specifically named *persons* whose legal rights, duties or privileges are being determined in the proceeding.” G.L. c. 30A, § 1(3) (emphasis added). For purposes of statutory construction in Massachusetts, the term “person” shall include “corporations, societies, associations and partnerships.” G.L. c. 4, § 7, cl. (23). With nothing more to rely than an historical practice with respect to billing disputes, the Department cannot deprive all business organizations the rights explicitly granted to them by statute.

Such a distinction would also violate the United States and Massachusetts Constitutions. Business entities, as well as natural persons, “may invoke the guaranty of equal protection of the laws assured by the Fourteenth Amendment.” *Vigeant v. Postal Telegraph Cable Co.*, 260 Mass.

335, 343, 157 N.E. 651 (1928). *See also* Massachusetts Constitution, Pt. 1, Art. 1. Such classifications among natural persons and business entities as the Department made in *Teleprocessing* must be reasonable and it must be made by the Legislature. *Vigeant, supra*, 260 Mass. 338. The Legislature has made no such classification between natural persons and business entities with respect to the Department's jurisdiction under G.L. c. 159, §§ 12 and 16, and the Department cannot fashion its own classification without such statutory authority.

II. Even If The Department's Jurisdiction Were Purely Discretionary, This Would Be An Appropriate Situation In Which To Exercise It.

The Department would be well-justified in asserting jurisdiction in this matter, if its jurisdiction were purely discretionary. In the several years immediately following the passage of the Telecommunications Act of 1996, the Department addressed a multitude of issues related to rules of the road for the newly-restructured telecommunications markets. In the past several years, the Department has had to confront a growing number of issues related to a necessary characteristic of those markets: financially distressed carriers. These issues did not present themselves when Verizon and its predecessors were the monopoly providers of intrastate service. Thus, the Department has had to fashion rules for the mass migration of customers from a carrier that is going out of business, and has had to exercise its supervisory jurisdiction over the treatment of customers by distressed carriers. *See Mass Migrations, supra, Network Plus, Inc., supra, and Broadview Networks, supra.*

These cases have come to the Department's attention after a carrier has already filed for Chapter 11 bankruptcy protection and, in some cases, the Department has had to move with great dispatch to prevent a loss of service to customers. Complaints such as Schreiber's present the Department with an opportunity to supervise the operations of financially-distressed carriers before they progress to the point that a cessation of service is imminent. Once the Department

grants a CLEC a certificate to operate, the Department undertakes no systematic review of that carrier's operations, other than through the requirement to file an annual report. Unlike the Department's detailed review of Verizon's performance as the ILEC, the only information the Department may have about a CLEC's operations may come from the complaints of customers such as Schreiber.

In this case, Schreiber has raised serious issues about CTC's ability to provide the services described in its intrastate tariff. The Department should take this opportunity to investigate the allegations in the Complaint in order to identify problems in CTC's operations before they result in possible interruptions in service to other customers similar to the ones experienced by Schreiber. The Department has broad discretion to fashion a remedy for any such problems it may find. Rather than declining to investigate the Complaint, the Department's discretion is best exercised in finding a remedy for any problems that it may find.

CONCLUSION

The Department clearly has jurisdiction to consider Schreiber's complaint pursuant to G.L. c. 159, §§ 12 and 16, among other statutory sections. This jurisdiction is not discretionary; the provisions of the APA require a full and fair hearing of the complaint. The Department has no reasonable grounds for distinguishing between commercial and residential customers with respect to complaints such as Schreiber's, although hearing the Complaint would not require the Department to revise its practice with respect to billing disputes, as in the *Teleprocessing* case. By investigating the Complaint as required by law now, the Department can identify any problems CTC may be having in its ongoing operations and adopt a remedy that both protects CTC's customers and is consistent with CTC's future viability.

Respectfully submitted,

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